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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

FIFTY SHADES LIMITED, a United
Kingdom private company; and
UNIVERSAL CITY STUDIOS LLC, a
Delaware limited liability company,

Plaintiffs,

v.

SMASH PICTURES, INC., a
California corporation; LUV MOVES,
a business entity of unknown form;
DANIEL QUINN, an individual;
STUART WALL, an individual;
JAMES LANE aka JIM POWERS, an
individual; RIGHT ASCENSION,
INC., d/b/a ADULT DVD EMPIRE, a
Pennsylvania corporation; and DOES 1
through 10, inclusive,

Defendants.

Case No. CV 12-10111-PSG (SHx)

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' EX PARTE
APPLICATION TO CONTINUE
THE PRELIMINARY
INJUNCTION HEARING TO
ALLOW FOR DISCOVERY**

1 **I. Introduction**

2 Defendants' slapped-together Ex Parte Application falls far short of
3 presenting a compelling justification for emergency relief. Defendants ignore the
4 strict standards imposed within the Ninth Circuit for expedited discovery relating
5 to a preliminary injunction motion. They do not even attempt to identify specific,
6 "targeted" discovery they wish to propound on an expedited basis, and they fail to
7 offer any concrete explanation why such discovery would be essential to their
8 ability to oppose Plaintiffs' pending preliminary injunction motion (the "PI
9 Motion"). Instead – after waiting a full month since the filing of Plaintiffs' motion
10 – Defendants now ask this Court effectively to postpone the injunction hearing
11 indefinitely and to authorize the Defendants (but not the Plaintiffs) to engage in
12 full-fledged discovery in the meantime. *See* Defendants' Proposed Order.
13 Defendants cite no authority whatsoever that would support such sweeping relief.

14 Even the discovery sought by Defendants in the premature and improper
15 Rule 30(b)(6) deposition notice they purported to serve on plaintiff Fifty Shades
16 Limited last week is vastly overbroad – encompassing nearly every issue in the
17 case – and thus fails to satisfy the operative standard for expedited discovery at this
18 stage of a case. Defendants' purported deposition notice – directed to the United
19 Kingdom-based party for whom an early and expedited deposition would pose the
20 greatest burden – sought testimony on no less than 10 separate subjects, including
21 such broad areas as "the marketing, development, creation, production, and
22 distribution" of any feature film adaptation of the Fifty Shades novels; "the
23 accused work in this action"; the "marketing and promotion" of the Fifty Shades
24 novels generally; and "all allegations" in the PI Motion and the accompanying
25 Erika Mitchell declaration. Defendants make no effort at all in their Application to
26 explain how testimony on these topics is critical to their ability to respond to the PI
27 Motion. (Indeed, Defendants do not even seem particularly troubled by the
28 prospect of interim injunctive relief, as they state in their Application that they are

1 willing to agree to cease distributing their allegedly infringing film, as well as any
 2 sequels, while they conduct the far-reaching and one-sided discovery they seek.
 3 *See App. at 5.)*

4 Furthermore, Defendants' unsupported assertion that they "believe that as
 5 much as 89% of the allegedly copyrighted material" is "derived from" previously-
 6 published *Twilight* fan fiction (App. at 2) is a highly misleading attempt to
 7 manufacture an issue where none exists. Defendants make it sound like the "fan
 8 fiction" they mysteriously refer to was written by someone else. What they fail to
 9 tell the Court is that this fan fiction is actually a novel written by and owned by
 10 Erika Mitchell – the *same person* who is the author of the *Fifty Shades of Grey*
 11 novels and who is the principal of plaintiff Fifty Shades Limited.¹

12 Defendants' Ex Parte Application is transparently a last-minute bid to put off
 13 indefinitely a court ruling on Plaintiffs' PI Motion. Because Defendants have
 14 failed to meet the operative standard for leave to conduct specifically-identified
 15 and narrowly-focused expedited discovery, the Court should deny the Application
 16 in its entirety.

17 **II. Factual Background**

18 Plaintiffs Fifty Shades Limited ("FSL") and Universal City Studios LLC
 19 ("Universal") filed the Complaint on November 27, 2012, seeking preliminary
 20 injunctive relief and other remedies for copyright infringement and other claims
 21

22 ¹ It has been widely reported that Ms. Mitchell initially wrote a novel called *Master*
 23 *of the Universe*, which inserted the main characters from the Stephenie Meyer
 24 *Twilight* novels into a new story created by Ms. Mitchell, a story that involved
 25 detailed descriptions of a dominant/submissive sexual relationship, and that Ms.
 26 Mitchell then changed the characters to become Anastasia Steele and Christian
 27 Grey and modified her own story to create the *Fifty Shades of Grey* novels. That
 28 an author's second version of a story resembles (even "89%" resembles) that same
 author's first version of the story is hardly remarkable, and it says nothing about
 whether Defendants copied the *Fifty Shades* novels in their unauthorized film
 adaptation.

arising from Defendants’ pornographic adaptation of Ms. Mitchell’s bestselling novels *Fifty Shades of Grey*, *Fifty Shades Darker*, and *Fifty Shades Freed* (the “Fifty Shades Trilogy”). Defendants have freely admitted to the media that in producing their film – which they titled “*Fifty Shades of Grey: A XXX Adaptation*” – they sought to replicate the Fifty Shades Trilogy as accurately as possible, describing their adaptation as “very true to the book,” with a script written “to be as close to the series as [the director] can get.” Dkt No. 19-6 (Kohn Decl., Ex. 16).

After engaging in unsuccessful settlement discussions with Defendants, Plaintiffs filed the PI Motion on January 29, 2013, setting the hearing for the earliest available date – April 1, 2013. *See* Dkt No. 19; *see also* Dkt No. 19-9 (Thomas Decl. ¶¶ 4-8). Based on that hearing date, Defendants’ opposition is due on March 11 – 40 days after the motion was filed, which is more than five times the seven-day minimum period provided by the Local Rules.

Seemingly unaware of the timing restrictions on initiating discovery under the Federal Rules of Civil Procedure, Defendants served a “Notice of Videotaped Deposition of Fifty Shades Limited with Request for Production of Documents” on February 22. The deposition notice purported to set a Rule 30(b)(6) deposition of Fifty Shades Limited covering ten broad subject areas² and seeking the production

² The subject matters are (1) the marketing, development, creation, production, and distribution of the feature film adaptation(s) of THE 50 SHADES MATERIALS, whether completed, planned, or pending; (2) the accused work in this action; (3) the creation, authorship, and publication of MASTER OF THE UNIVERSE; (4) the creation, authorship, and publication of THE 50 SHADES MATERIALS; (5) the similarities and differences between MASTER OF THE UNIVERSE and THE 50 SHADES MATERIALS; (6) the marketing and promotion of THE 50 SHADES MATERIALS; (7) the similarities and differences between THE 50 SHADES MATERIALS and the accused work in this action; (8) all allegations set forth in the declaration signed by MITCHELL that was filed in connection with the motion for a preliminary injunction that was filed in this action; (9) all allegations set forth in the motion for a preliminary injunction that was filed in this action; and (10) the copyrights asserted in this litigation. *See* Declaration of Steven Lauridsen, Ex. 1.

1 of documents on March 6, 2013, five days before Defendants' opposition to the PI
2 Motion is due.

3 Fifty Shades Limited is located in the United Kingdom and is owned by
4 Erika Mitchell, who wrote the Fifty Shades Trilogy under the pen name E L James.
5 Defendants' deposition notice plainly was intended to make Ms. Mitchell travel
6 from the United Kingdom to Los Angeles for an early and unnecessary deposition.

7 On February 27, Plaintiffs sent Defendants a letter informing them that the
8 their deposition notice was premature and unenforceable under Rule 26(d)(1) of
9 the Federal Rules of Civil Procedure, because they served it before the parties'
10 Rule 26(f) conference. *See* Lauridsen Decl., Ex. 2. The Rule 26(f) conference
11 must occur in approximately four months, by June 24, 2013, because this matter is
12 set for a scheduling conference on July 15, 2013. *See* Dkt. No. 27. Plaintiffs'
13 letter also explained that, in any event, a deposition notice with document requests
14 requires 30 days' notice under Rule 34(b)(2)(A) and Rule 30(b)(2). *Id.* After
15 Plaintiffs informed Defendants that FSL would not produce a witness or
16 documents on March 6, Defendants filed the instant Ex Parte Application seeking
17 virtually unlimited discovery and an indefinite continuance of the preliminary
18 injunction hearing.

19 **III. Defendants' Emergency Request For A Continuance To Conduct Full-**
20 **Fledged Discovery Does Not Remotely Satisfy The Standard For Such**
21 **Extraordinary Relief**

22 "Ex parte relief is reserved for applicants who demonstrate why they should
23 be allowed to 'go to the head of the line in front of all other litigants and receive
24 special treatment.'" *Pate v. Wells Fargo Bank Home Mortg., Inc.*, 2011 U.S. Dist.
25 LEXIS 73781, at *3 (C.D. Cal. July 7, 2011) (quoting *Mission Power Engineering*
26 *Co. v. Continental Casualty Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995)). A party
27 requesting ex parte relief must establish "that it is without fault in creating the
28 crisis that requires ex parte relief, or that the crisis occurred as a result of excusable

neglect.” *United States ex rel. Lee v. Corinthian Colleges*, 2013 U.S. Dist. LEXIS 14995, at *1-2 (C.D. Cal. Feb. 4, 2013) (citing *Mission Power Engineering*, 883 F. Supp. at 492). As set forth in this Court’s standing order, “Ex parte applications are solely for extraordinary relief and should be used with discretion. Sanctions may be imposed for misuse of ex parte applications.” Dkt No. 11. The scheduling order also makes clear that continuances are “disfavored,” because “[t]his Court has a strong interest in keeping scheduled dates certain.” *Id.*

Here, Defendants’ request for a continuance is a “crisis” of their own making. Because their opposition papers were not due until six weeks after Plaintiffs filed the PI Motion, Defendants could have applied much sooner for expedited discovery, narrowly focused on opposing the motion, without needing to move the hearing date. Yet Defendants waited a month to file this emergency application. They do not provide any explanation for their delay (or for their earlier service of a facially improper deposition notice). Instead, they boldly ask this Court “to waive the Rule 26(d)(1) stay on discovery” (App. at 3), continue the hearing to an unspecified date, and even be “willing to entertain further continuances” (*see* Proposed Order). Having sat on their hands for a month, Defendants now ask this Court to reward them with an emergency order delaying indefinitely a hearing on Plaintiffs’ preliminary injunction motion. Defendants utterly fail to justify such extraordinary relief.

IV. Defendants Request For Full-Fledged Discovery Is Without Merit

Defendants’ ex parte application is predicated on the false notion that they are entitled to full-fledged (and one-sided) discovery simply because Plaintiffs have moved for a preliminary injunction. They do not cite to a single case that supports a complete waiver of the Rule 26(d)(1) stay of discovery due to a pending preliminary injunction motion or even attempt to justify why such a waiver is warranted here.

1 “[E]xpedited discovery is not automatically granted merely because a party
2 seeks a preliminary injunction.” *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d
3 1063, 1066 (C.D. Cal. 2009). A defendant opposing a preliminary injunction must
4 demonstrate that “the need for expedited discovery, in consideration of the
5 administration of justice, outweighs the prejudice to the responding party.”
6 *Hansen Beverage Co. v. Innovation Ventures, LLC*, Civil No. 08-cv-1166-IEG
7 (POR), 2008 WL 3992353, *1 (S.D. Cal., Aug. 28, 2008) (denying defendant’s ex
8 parte application for expedited discovery in opposition to preliminary injunction
9 where plaintiff would be unduly prejudiced by having to respond in an expedited
10 manner).

11 In deciding whether to grant a request for expedited discovery, courts
12 consider factors including “(1) whether a preliminary injunction is pending; (2) the
13 breadth of the discovery requests; (3) the purpose for requesting the expedited
14 discovery; (4) the burden on the responding party in complying with the request;
15 and (5) how far in advance of the typical discovery process the request was made.”
16 *Quia Corp. v. Mattel, Inc.*, No. C10-01902 JF (HRL), 2010 WL 2179149, *1 (N.D.
17 Cal., May 27, 2010).

18 Expedited discovery requests may not be “excessively broad.” Instead, they
19 should be “narrowly tailored” and directly relevant to the preliminary injunction
20 motion. *Palermo v. Underground Solutions, Inc.*, No. 12cv1223-WQH (BLM),
21 2012 WL 2106228, *3 (S.D. Cal., June 11, 2012). Indeed, “courts generally deny
22 motions for expedited discovery when the movant’s discovery requests are overly
23 broad.” *Philadelphia Newspapers v. Gannett Satellite Info. Network*, 1998 U.S.
24 Dist. LEXIS 10511, at *6 (E.D. Pa. July 15, 1998) (denying “time-consuming
25 discovery” requests “[w]ithout reasonable boundaries”).

26 For example, one court denied a defendant’s motion for expedited discovery
27 to rebut the plaintiff’s preliminary injunction motion, “[b]ecause defendant fails to
28 indicate *what specific information it believes should be subject to discovery* for the

1 limited purpose of responding to plaintiff's pending motion.” *Boathouse Group,*
2 *Inc. v. TigerLogic Corp.*, 777 F. Supp. 2d 243, 254 (D. Mass. 2011) (emphasis
3 added). Another court denied a request for expedited discovery that was “a
4 broadside not reasonably tailored to the time constraints under which both parties
5 must proceed or to the specific issues that will have to be determined at the
6 preliminary injunction hearing.” *Irish Lesbian & Gay Org. v. Giuliani*, 918 F.
7 Supp. 728, 731 (S.D.N.Y. 1996).

8 Here, Defendants are not seeking specific “targeted” discovery. They do not
9 propose specific document requests, particular interrogatories, or limited
10 depositions on narrowly drawn topics. To the contrary, as their Proposed Order
11 makes clear, Defendants seek an unlimited waiver of the Rule 26(d)(1) hold on
12 discovery four months before they would otherwise be entitled to full discovery.
13 On its face, such wide-ranging expedited discovery is excessive, overreaching, and
14 unduly burdensome. *See Palermo*, 2012 WL 2106228, at *3 (denying expedited
15 discovery where the request “appears to be a vehicle to conduct the entirety of his
16 discovery prior to the Rule 26(f) conference, and would present an undue burden
17 on Defendant at this stage in the proceedings”).

18 Defendants fail to explain how *any* discovery is necessary at this stage to
19 oppose Plaintiffs’ preliminary injunction motion. *See Hansen Beverage*, 2008 WL
20 3992353, at *2 (denying defendant’s ex parte application for expedited discovery
21 where defendant failed to explain need for documents and deposition in light of
22 information already available to it). They broadly and generically assert that they
23 “should be allowed to test” the evidence Plaintiff submitted in support of their
24 preliminary injunction motion. *See App.* at 2. If that were a sufficient basis to
25 waive the stay on early discovery, every party opposing a preliminary injunction
26 would automatically be entitled to full discovery. But even limited expedited
27 discovery is not automatic and may only be granted upon a showing of good cause.
28 *See Am. LegalNet*, 673 F. Supp. 2d at 1066.

Defendants also claim that they “should be allowed the opportunity to develop their own affirmative evidence concerning the originality of the allegedly copied scenes and dialog” (App. at 2), again without explaining why they cannot do so without early discovery. Moreover, their unsupported assertion that “as much as 89% of the allegedly copyrighted material is derived from previously published, public domain fan fiction based on Stephanie Myers’ *Twilight* novels” (App. at 2) is both deliberately misleading and legally flawed. Defendants suggest that the Fifty Shades Trilogy is “derived from” works by authors other than Erika Mitchell. However, Defendants are in fact referring to an earlier version of the same story *written by Ms. Mitchell*, which they in their own improper deposition notice identified as “*Master of the Universe.*” See Ex. 1 at 4 (“‘MASTER OF THE UNIVERSE’ shall mean any works titled Master of the Universe that were purportedly authored, created, and/or published by MITCHELL”). Defendants do not and cannot provide any legal authority for the proposition that an earlier version of Ms. Mitchell’s work is now in the “public domain.” They can hardly defend their infringement of Plaintiffs’ copyrights in the Fifty Shades Trilogy by claiming that it is substantially similar to Ms. Mitchell’s own earlier work.

Even the improper deposition notice Defendants tried to serve is vastly overbroad and fails to satisfy the relevant standard. Instead of seeking “narrowly tailored” discovery critical to opposing the PI Motion, Defendants’ proposed Rule 30(b)(6) deposition would cover no less than ten separate subjects, including “all allegations” in the PI Motion and the supporting Mitchell declaration, regardless of whether Defendants can respond to those allegations without such testimony.

The notice demands testimony from Fifty Shades Limited – meaning, effectively, from Ms. Mitchell – on such broad subjects as “the marketing, development, creation, production, and distribution” of any feature film adaptation of the Fifty Shades Trilogy and the “marketing and promotion” of the Fifty Shades Trilogy. The deposition subjects also include topics upon which Defendants have

1 superior knowledge, such as “the accused work in this action.” And despite having
2 repeatedly and publicly admitted that they copied the Fifty Shades Trilogy and
3 tried to “be as close to the [book] series as [the director] can get” (Dkt No. 19-6
4 (Kohn Decl., Ex. 16)), Defendants nonetheless seek testimony from FSL on the
5 “similarities and differences” between the Fifty Shades Trilogy and “the accused
6 work in this action.” Moreover, Defendants’ Ex Parte Application completely fails
7 to address why testimony on any of these subjects is relevant, urgent, and
8 necessary to oppose the PI Motion.

9 Remarkably, Defendants contend that Plaintiffs would not be prejudiced
10 because their request to continue the preliminary injunction hearing to an
11 unspecified date while they engage in unspecified and unrestricted discovery
12 “should not cause any delay.” App. at 4. But an indefinite delay is exactly what
13 they seek. Indeed, their Proposed Order expressly contemplates “further
14 continuances to ensure an adequate record is developed for this motion.”
15 Defendants attempt to “alleviate” this manifest prejudice by “represent[ing] that
16 they will extend [their] agreement” to “temporarily cease sales of the accused
17 work” (App. at 4-5), but their Proposed Order contains no such language. Even if
18 it did, Plaintiffs plainly would be prejudiced by having to bear the burden and
19 expense of responding to unlimited *and completely one-sided* discovery.
20 Defendants have indicated that such discovery would include, at a minimum, the
21 immediate deposition of a witness based in the United Kingdom on ten broad
22 subjects. *See* note 1, *supra*. Plaintiffs would be unduly prejudiced if Defendants
23 are permitted to take such a deposition, let alone given wide latitude to “conduct
24 discovery concerning the motion for preliminary injunction prior to the parties’
25 Rule 26(f) conference” (*see* Proposed Order), while Plaintiffs have to wait another
26 four months to obtain any discovery from them.

27 The cases Defendants cite do not support their overreaching request for a
28 complete waiver of the Rule 26(d)(1) stay of early discovery. In *Stanley v.*

1 *University of S. Cal.*, for example, the Ninth Circuit held that a district court did
 2 *not* err “in resolving the preliminary injunction without providing [the plaintiff] an
 3 opportunity to conduct discovery,” and simply cited a treatise for the proposition
 4 that good cause “may exist” for early discovery in connection with a preliminary
 5 injunction motion. *See* 13 F.3d 1313, 1326 (9th Cir. 1994). In *Semitool, Inc. v.*
 6 *Tokyo Electron Am.*, the court permitted only “narrowly tailored” discovery to
 7 “mov[e] this case forward,” and noted that the plaintiff’s discovery requests
 8 “entail[] not ... a free ranging deposition for which a representative of Defendants
 9 may not have had sufficient time or information with which to prepare.” 208
 10 F.R.D. 273, 277 (N.D. Cal. 2002). Here, in contrast, Defendants initially
 11 demanded a “free ranging deposition” and now seek *free ranging discovery*
 12 without any limitation on the number of depositions, document requests, or
 13 interrogatories. They are not seeking discovery to move the case forward, but to
 14 indefinitely stall Plaintiffs’ PI Motion while they alone are permitted to engage in
 15 full discovery.

16 **V. Conclusion**

17 For the foregoing reasons, Plaintiffs respectfully request that Defendants’ Ex
 18 Parte Application be denied in its entirety.

19 Dated: March 1, 2013

JENNER & BLOCK LLP

21
 22 By /s/ Andrew J. Thomas
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23
 24 Attorneys for Plaintiffs
 25 Fifty Shades Limited and
 26 Universal City Studios LLC
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